

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

JONATHAN CONRAD FULLER,

Plaintiff,

No. CIV S-04-1276 FCD EFB P

vs.

CALIFORNIA DEPARTMENT OF  
CORRECTIONS, et al.,

FINDINGS AND RECOMMENDATIONS

Defendants.

Plaintiff is a prisoner without counsel suing for alleged civil rights violations. *See* 42 U.S.C. § 1983. His August 2, 2005, second amended complaint asserts the following claims: (1) from September 2000 through April 2001, defendant Dr. Altchek refused to examine plaintiff to determine the source of plaintiff's severe pain, which was caused by tuberculosis of the bone and ultimately required plaintiff to undergo surgery and to suffer neurological deficiencies; (2) defendant Dr. Dhillon ordered diagnostic tests unrelated to plaintiff's pain; (3) defendant Dr. Mehta referred plaintiff to a psychiatrist for plaintiff's complaints of pain; (4) defendants Donahue, Andreasen and Ramirez-Palmer learned through the appeals process that plaintiff was not receiving proper medical attention but did not remedy the situation; (5) in February 2004, plaintiff fell in the shower and defendant Pai only gave plaintiff Tylenol; (6) in February 2004, after plaintiff threatened to file a grievance complaining of defendant Murray's threatening and

1 harassing behavior, Murray retaliated by entering plaintiff's cell and destroying plaintiff's  
2 personal property. Plaintiff also raises a number of negligence claims, which are governed by  
3 California law. Defendants Murray, Ramirez-Palmer, Andreasen and Donahue contend that  
4 plaintiff has not satisfied the exhaustion requirement with respect to any claims against them.  
5 Defendants Mehta, Dhillon, Altchek and Pai contend that there is no genuine dispute about  
6 whether they were deliberately indifferent to plaintiff's serious medical needs. All defendants  
7 also assert that plaintiff failed to preserve his state-law claims under the California Tort Claims  
8 Act.

9 For the reasons explained below, the court finds that all defendants are entitled to  
10 summary judgment and that the court should dismiss plaintiff's state-law claims.

#### 11 **I. Facts**

12 At all times relevant to this action, plaintiff was a prisoner at the California Medical  
13 Facility. Defendants Altchek, Dhillon and Mehta were physicians. Defs.' Mot. for Summ. J.,  
14 Exs. B, C, & D. Defendant Donahue was a medical technical assistant. Defs.' Mot. for Summ.  
15 J., Ex. F, Decl. of Donahue ("Donahue Decl."), ¶ 2. One of Donahue's responsibilities was to  
16 interview prisoners who filed grievances and appeals about medical issues. *Id.*, ¶¶ 1-6. Donahue  
17 interviewed plaintiff about a grievance in which plaintiff alleged that he had been denied an  
18 MRI. *Id.* Donahue asserts in his declaration that after this interview, he would have consulted  
19 with the Chief Medical Officer about the appeal. *Id.* Donahue did not have the authority to take  
20 any actions, make any recommendations about or to grant or deny prisoners' appeals. *Id.*  
21 Actually resolving medical appeals falls to the physicians. *Id.*

22 Defendant Andreasen was the Chief Medical Officer. Defs.' Mot. for Summ. J., Ex. G,  
23 Decl. of Andreasen ("Andreasen Decl."). Until November 2001, Ramirez-Palmer was the  
24 warden. Defs.' Mot. for Summ. J., Ex. H, Decl. of Ramirez-Palmer ("Ramirez-Palmer Decl."),  
25 ¶ 1. From November 2001 until December 2004, she was the Northern Region Administrator for  
26 the CDCR, and was not in any way involved with prisoners' appeals or citizen's complaints filed

1 with the Internal Affairs Division of the Office of Investigative Services. *Id.*, ¶ 2. While she  
2 was the warden, all prisoner appeals and citizens' complaints received at the warden's office  
3 were sent to the Appeals Coordinator. *Id.*, ¶ 3. The appeals coordinator would log them for  
4 processing. *Id.* Grievances and internal affairs complaints about medical treatment were sent to  
5 the medical services division for review and handling by the chief Deputy of Clinical Services or  
6 his designees. *Id.* Ramirez-Palmer had no direct supervision over the medical services  
7 department at CMF. *Id.*, ¶ 4. Ramirez-Palmer asserts in her declaration that she does not recall  
8 receiving any correspondence or other notice about an internal affairs complaint filed by plaintiff  
9 or his wife about plaintiff's medical care. *Id.*, ¶ 5 If the warden's office had received such a  
10 document, it would have been sent to the medical division. *Id.*

11 Plaintiff was incarcerated at the Contra Costa County Jail between 1991 and 1993.  
12 Defs.' Mot. for Summ. J., Ex. A, Deposition of Plaintiff ("Pl.'s Dep."), at 12. While there, he  
13 was exposed to tuberculosis. *Id.*, at 13. Based on x-rays of his chest, he was informed that he  
14 had not contracted the disease. *Id.*, at 106. Plaintiff did, however, experience flu-like symptoms  
15 for which he was treated with an oral medication. *Id.*

16 In July of 1999, plaintiff was transferred to CMF. Pl.'s Dep., at 9. On November 16,  
17 2000, he went to the medical clinic complaining of left lower chest pain, which became sharp  
18 and aggravated when lying down on either side. Defs.' Mot. for Summ. J., Ex. C, Decl. of  
19 Mehta ("Mehta Decl."), Attach. at 5. Dr. Mehta examined him, and found that the pain was not  
20 aggravated with deep breathing or standing, and plaintiff had no fever, constipation or heartburn.  
21 *Id.*; Pl.'s Dep., at 147. Upon applying pressure, Dr. Mehta found plaintiff's lower left two ribs  
22 were tender. Mehta Decl., Attach., at 5. Dr. Mehta noted that November 9, 2000, x-rays of  
23 plaintiff's left ribs revealed no abnormalities. *Id.*, at 4-5. Dr. Mehta ordered four medications  
24 for pain and stomach upset, a series of blood tests and a urinalysis to rule out urinary tract  
25 infection. *Id.*, at 4. Finally, he ordered plaintiff to remain in bed for 48 hours and to return to the  
26 clinic for a follow-up examination. *Id.*, at 6.

1 In December of 2000, Dr. Altchek saw plaintiff for pain in the left side of his chest.  
2 Defs.' Mot. for Summ. J., Ex. B, Decl. of Altchek ("Altchek Decl."), ¶ 5. Dr. Altchek physically  
3 examined plaintiff, ordered blood tests and a CT scan of the area of his rib cage. *Id.* Dr. Altchek  
4 also prescribed medications for plaintiff, including for pain. *Id.* Plaintiff underwent the CT  
5 scan, which revealed no abnormalities. *Id.*, ¶ 6. Since plaintiff had not expressed an experience  
6 of any pain in the region of his spine, no x-rays of this area were ordered. *Id.* Other than the  
7 pain in his left side, plaintiff did not report any other symptoms to Altchek. *Id.* Altchek did,  
8 however, refer plaintiff to defendant Dr. Mehta.

9 On December 15, 2000, plaintiff submitted a grievance, designated Log. No. 00-M-1656.  
10 Andreasen Decl., Attach., at 1. In it, he claimed that physicians had failed to diagnose the source  
11 of his severe pain, and that Altchek in particular insisted that nothing was wrong. *Id.*, at 1-7.  
12 The appeal was rejected as too lengthy, but he resubmitted it. Defs.' Mot. for Summ. J, Ex. I,  
13 Decl. of Perry ("Perry Decl."), Attach. 1. The informal level of review was bypassed.  
14 Andreasen Decl., Attach., at 1. Thus, on January 22, 2001, defendant Donahue interviewed  
15 plaintiff about the appeal and Andreasen reviewed it on the first formal level. *Id.*, at 9.  
16 Andreasen denied the appeal. *Id.* Plaintiff had undergone a CT scan and of the three physicians  
17 who had examined plaintiff since November of 2000, not one believed that an MRI would  
18 contribute to the diagnosis. *Id.* T. Emigh asserts that CDCR records show that plaintiff did not  
19 pursue this appeal to the second formal level of review or to the Director's Level of Review.  
20 Defs.' Mot. for Summ. J., Ex. L, Decl. of Emigh ("Emigh Decl."), ¶ 8.

21 Plaintiff returned to the clinic on January 23, 2001. Mehta Decl., ¶ 6. He reported mid-  
22 back pain, indicating his spine, and "excruciating pain" in the left lower chest area and radiating  
23 epigastrium. *Id.*, Attach., at 2. Dr. Mehta examined plaintiff, and determined that plaintiff had  
24 no headaches, fainting episodes or regurgitation and no injury within the past three years. *Id.*, at  
25 3. He also noted that the chest CT scan from January 3, 2001, was negative for abnormalities.  
26 *Id.*, at 3-4. Dr. Mehta decided to rule out acid peptic disease and other stomach disorders. *Id.*

1 To this end, he ordered an upper GI series and an H. Pylori antibody test. *Id.* He examined  
2 plaintiff, and found that plaintiff's complaints could be somatic. *Id.* Thus, in addition to the  
3 diagnostic measures, Dr. Mehta also referred plaintiff to the psychiatry clinic to rule out possible  
4 somatization disorder, obsessive-compulsive disorder. and personality disorder. *Id.*, at 6.

5 Plaintiff was rushed to the emergency room on February 7, 2001, for dizziness and for  
6 pain in his left side and in the mid-quadrant of his stomach. Altchek Decl., Attach., at 10.  
7 Shortly after his arrival, he lost consciousness, but would cry when moved to one side or the  
8 other. *Id.* Altchek examined him, and noted that the upper GI series results suggested  
9 duodenitis and duodenal peptic ulcer disease. *Id.* Therefore, he recommended continuing the  
10 current medications, plus Tylenol. *Id.*, at 4. He ordered a follow-up examination with Dr.  
11 Dhillon within seven to ten days. *Id.* On February 14, 2001, plaintiff returned to the clinic for  
12 pain and burning in his stomach. Defs.' Mot. for Summ. J., Ex. D, Decl. of Dhillon ("Dhillon  
13 Decl."), Attach., at 4; Pl.'s Dep., at 143-44. Dr. Dhillon noted that the blood tests showed an  
14 elevated level of H. Pylori and the upper G.I. series revealed duodenitis, and that sickle cell  
15 anemia should be ruled out. *Id.* Dhillon also noted that plaintiff had obvious compression of the  
16 T-8 vertebra in his lower back, which had been causing numbness in his feet and genitals since  
17 September of 2000. Dhillon Decl., Attach., at 16. He ordered medication for the duodenitis and  
18 elevated H. Pylori levels and referred plaintiff to the orthopedic clinic for his low back pain. *Id.*,  
19 at 13, 16.

20 On February 27, 2001, defendant Dhillon examined plaintiff for complaints of mid-back  
21 pain, and found that plaintiff clinically was stable. Dhillon Decl., Attach., at 12.. He prescribed  
22 Tylenol, recommended continuing the current medications at least until plaintiff was seen by  
23 specialists, and ordered a follow-up appointment. *Id.* On March 2, 2001, Dhillon renewed  
24 plaintiff's medications and referred plaintiff to the G.I. clinic. Dhillon Decl., Attach., at 2.  
25 Despite the medications, plaintiff's discomfort continued. Dhillon Decl., ¶¶ 5-8; Altchek Decl.,  
26 ¶ 10. Dhillon saw plaintiff on March 15, 2001, for a follow up exam. Dhillon Decl., Attach., at

1 1, 9. Dhillon recommended continuing with the medications and following up with the GI,  
2 neurology and orthopedic clinics, and he authorized plaintiff to remain in his cell so that he  
3 would not have to work for several weeks. *Id.* He instructed plaintiff not to lift more than 10  
4 pounds, not to stand for more than 30 minutes and instructed plaintiff to return for a follow-up  
5 appointment. *Id.*, at 9, 10.

6 Plaintiff was examined by Altchek on March 20, 2001, who ordered a follow up  
7 appointment with Dr. Dhillon within three work days. *Id.*, at 1,8. Plaintiff's medical records  
8 show that on this date Dr. Altchek "threw [plaintiff] out when he stated where did I get my  
9 medical degree, etc." Altchek Decl., Attach., at 8.

10 On March 27, 2001, plaintiff again saw Altchek, who ordered blood tests, including a  
11 complete blood count, and a one-week lay in and cell feeding. Altchek Decl., ¶ 10. Dr. Altchek  
12 also ordered an MRI of the L-S spine, and noted a previous order for an MRI of the T-8 region.  
13 *Id.* On April 6, 2001, plaintiff underwent an MRI on his spine. Altchek Decl., Attach., at 25.  
14 The radiologist found significant compression of the T-8 vertebra, and determined that it had  
15 progressed since a February 13, 2001, radiological examination. *Id.* While the findings were  
16 consistent with a "pathological fracture," the cause could also be a cancer, an infection such as  
17 tuberculosis, or a fungus. *Id.*

18 In April 2001, plaintiff went to the Queen of the Valley Hospital in Napa for spinal  
19 surgery. Altchek Decl., ¶ 11; Andreasen Decl., ¶ 8. The surgeons performed a biopsy of  
20 plaintiff's spine, and ultimately diagnosed plaintiff with Pott's Disease. Pl.'s Dep., at 14-15, 99;  
21 Altchek Decl., ¶ 11; Andreasen Decl., ¶ 8. This is a rare condition in which tuberculosis infects  
22 the spine instead of the lungs. Altchek Decl., ¶ 11; Andreasen Decl., ¶ 8. After recovering from  
23 the surgery, plaintiff returned to CMF.

24 On February 20, 2004, defendant Dr. Pai saw plaintiff in the prison emergency clinic for  
25 plaintiff's report that he had fallen in the shower. Defs.' Mot. for Summ. J., Ex. E, Decl. of Pai  
26 ("Pai Decl."), ¶ 4. Plaintiff reported minimal discomfort in the sacral area and ankle pain, and he

1 was able to move his lower extremities without difficulties. Pai Decl., Attach., at 1. On  
2 examination, Pai found that plaintiff was alert, awake and responsive. *Id.* Plaintiff was able to  
3 bend down to unlace his shoes without visible discomfort, and his left ankle was slightly  
4 swollen. *Id.* Pai prescribed Motrin 600 mg, ordered an ice pack and Ace bandage for his ankle,  
5 and authorized plaintiff for cell-feeding for one week. *Id.* Pai diagnosed plaintiff with left ankle  
6 sprain and musculoskeletal back injury with minimal discomfort, and requested that plaintiff  
7 return for a follow-up appointment within three days. *Id.*

8 In addition to his medical treatment, plaintiff also complains of pictures that were  
9 removed from his wall. At the time of the events giving rise to plaintiff's claims against Murray,  
10 pictures from magazines were considered contraband under CDCR policy. Defs.' Mot. for  
11 Summ. J., Ex. K, Decl. of Norris ("Norris Decl."), ¶ 5. Thus, they were subject to confiscation  
12 by guards at any time. *Id.* Also, guards may designate where on the cell walls prisoners may  
13 post photographs or other items. *Id.*, at 4. Ordinarily, guards delineate these with marks painted  
14 on the cell wall. *Id.* Prisoners may not mark or select their own areas for posting photos and  
15 documents. *Id.* They must request that guards select an area for them. *Id.* If a prisoner exceeds  
16 the designated wall space, then any guard or custodial staff may remove whatever is posted  
17 outside the designated area. *Id.* Prison officials consider the unbridled posting of papers and  
18 photographs on cell walls to be a security issue because cluttered walls could hinder cell  
19 searches, or conceal contraband or holes in the wall. *Id.*

20 In February 2004, defendant Murray entered plaintiff's cell and removed magazine  
21 pictures from plaintiff's cell wall. Pl.'s Dep., at 21, 26, 13; Defs.' Mot. for Summ. J., Ex. J, Def.  
22 Murray's Resp. to First Set of Interrogs., Nos. 2, 3, 4; Norris Decl., at ¶¶ 4, 5, 6. At deposition,  
23 plaintiff could not recall whether the pictures Murray removed were from magazines. Pl.'s Dep.,  
24 at 21, 26. Nor does he recall whether the family photographs he now has are the same he had the  
25 time Murray searched his cell. *Id.* On February 15, 2004, plaintiff filed a grievance about Sgt.  
26 Murray, designated Log. No. 04-M-282. Perry Decl. & Attach., at 41. In it, he complained that

1 defendant Sgt. Murray entered plaintiff's cell, used profanity and tore photographs of plaintiff's  
2 family and unspecified magazine pictures off the wall. *Id.*, at 41, 44. He requested that Murray  
3 be reprimanded, relieved of duty, fined and that plaintiff's pictures be returned. *Id.*, at 41.

4 The first informal level of review was bypassed. A correctional lieutenant investigated  
5 the matter and interviewed both plaintiff and defendant Sgt. Murray. The reviewer found that  
6 Murray ordered plaintiff to remove the pictures so as to comply with institutional regulations and  
7 when plaintiff refused, Murray entered the cell and removed them himself. *Id.*, at 45. Murray  
8 denied using profanity. *Id.* The officer who accompanied Sgt. Murray that day verified  
9 Murray's account. *Id.*, at 45. Therefore, on April 2, 2004, plaintiff's allegations were  
10 determined to be unfounded and the appeal was denied. *Id.*

11 On April 15, 2004, plaintiff appealed to the second formal level of review, calling  
12 Murray and the other officers liars, denying having been argumentative and asserting that no one  
13 spoke to prisoners in the surrounding cells as part of the investigation.<sup>1</sup> *Id.*, at 42. Plaintiff does  
14 not recall appealing defendant Murray's conduct to the second formal level of review. Pl.'s  
15 Dep., at 38, 40. There is no evidence of the disposition of the appeal on the second formal level  
16 of review. Nor is there any evidence that plaintiff appealed to the Director's Level of Review.

17 Defendants Ramirez-Palmer, Andreasen and Donahue have submitted the declaration of  
18 the then Acting Chief of the Inmate Appeals Branch, T. Emigh, in support of their contention  
19 that plaintiff did not file any grievance against them about the allegations he makes in this  
20 action. Defs.' Mot. for Summ. J., Ex. L, Decl. of Emigh ("Emigh Decl."). T. Emigh states that  
21 he searched CDCR records for any appeal that plaintiff may have filed against Andreasen,  
22 Donahue, Murray and Ramirez-Palmer about his medical treatment at CMF. Emigh Decl., ¶ 8.  
23 He found no record that any appeal about plaintiff's medical care at CMF had been accepted for  
24 review on the Director's Level of Review. *Id.*, ¶ 10. At deposition, plaintiff conceded that no  
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26 <sup>1</sup> The remainder of this appeal, at page 43, is not legible in its electronic form.



one prevented him from submitting appeals on any of these matters for review on the Director's Level of Review. Pl.'s Dep., at 38, 40.

Plaintiff did not properly submit his claims to the State of California's Victim's Compensation and Government Claims Board (formerly known as the State Board of Control). Perry Decl., ¶¶ 4, 5.

## II. Rule 56 Standards

Summary judgment is appropriate when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).<sup>2</sup> As explained by the Ninth Circuit, the utility of Rule 56 to screen which cases actually require resolution of disputed facts over material issues (through presentation of testimony and evidence at trial) has been clarified and enhanced.

In three recent cases, the Supreme Court, by clarifying what the non-moving party must do to withstand a motion for summary judgment, has increased the utility of summary judgment. First, the Court has made clear that if the non-moving party will bear the burden of proof at trial as to an element essential to its case, and that party fails to make a showing sufficient to establish a genuine dispute of fact with respect to the existence of that element, then summary judgment is appropriate. *See Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Second, to withstand a motion for summary judgment, the non-moving party must show that there are "genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) (emphasis added). Finally, if the factual context makes the non-moving party's claim implausible, that party must come forward with more persuasive evidence than would otherwise be necessary to show that there is a genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). No longer can it be argued that *any disagreement* about a material issue of fact precludes the use of summary judgment.

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<sup>2</sup> On November 22, 2004, the court expressly informed plaintiff of the requirements for opposing a motion pursuant to Rule 56 of the Federal Rules of Civil Procedure. *See Rand v. Rowland*, 154 F.3d 952, 957 (9th Cir. 1998) (en banc), *cert. denied*, 527 U.S. 1035 (1999), and *Klinge v. Eikenberry*, 849 F.2d 409, 411-12 (9th Cir. 1988). Pursuant to *Wyatt*, 315 F.3d at 1120, n.4, that order also expressly informed plaintiff of the requirements for opposing a failure to exhaust motion that is supported by affidavits or declarations and exhibits.

1 *California Arch. Bldg. Prod. v. Franciscan Ceramics*, 818 F.2d 1466, 1468 (9th Cir.), *cert.*  
 2 *denied*, 484 U.S. 1006 (1988) (parallel citations omitted) (emphasis added). In short, there is no  
 3 "genuine issue as to material fact," if the non-moving party "fails to make a showing sufficient to  
 4 establish the existence of an element essential to that party's case, and on which that party will  
 5 bear the burden of proof at trial." *Grimes v. City and Country of San Francisco*, 951 F.2d 236,  
 6 239 (9th Cir. 1991) (quoting *Celotex*, 477 U.S. at 322). There can be no genuine issue as to any  
 7 material fact where there is a complete failure of proof as to an essential element of the  
 8 nonmoving party's case because all other facts are thereby rendered immaterial. *Celotex*, 477  
 9 U.S. at 323.

10 With these standards in mind, it is important to note that plaintiff bears the burden of  
 11 proof at trial over the issue raised on this motion, i.e., whether the defendant acted with  
 12 deliberate indifference to the plaintiff's safety. Equally critical is that "deliberate indifference"  
 13 is an essential element of plaintiff's cause of action. Therefore, to withstand defendant's motion,  
 14 plaintiff may not rest on the mere allegations or denials of his pleadings. He must demonstrate a  
 15 genuine issue for trial, *Valandingham v. Bojorquez*, 866 F.2d 1135, 1142 (9th Cir. 1989), and he  
 16 must do so with evidence upon which a fair-minded jury "could return a verdict for [him] on the  
 17 evidence presented." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 248, 252.

### 18 **III. Analysis**

19 "As to materiality, the substantive law will identify which facts are material. Only  
 20 disputes over facts that might affect the outcome of the suit under the governing law will  
 21 properly preclude the entry of summary judgment." *Id.* at 248. Here, plaintiff's action arises  
 22 under 42 U.S.C. Section 1983 and the Eighth, First and Fourteenth Amendments. The defense  
 23 asserted by defendants Andreasen, Donahue and Ramirez-Palmer arises under 42 U.S.C.  
 24 § 1997e(a). To have brought this action in the first place, he must have exhausted the available  
 25 administrative remedies within the prison. 42 U.S.C. § 1997e(a). To prevail at trial, he must  
 26 prove that defendants Altchek, Dhillon, Mehta and Pai deprived him of his Eighth Amendment

rights while acting under color of state law. To prove an Eighth Amendment violation, plaintiff must show by a preponderance of competent evidence that they knew plaintiff suffered a serious medical need and that they were “deliberately indifferent” to it. *Farmer v. Brennan*, 511 U.S. 825, 834, 837 (1994); *Estelle v. Gamble*, 429 U.S. 97, 106 (1976).

#### **A. Failure to Exhaust**

A prisoner may bring no action under 42 U.S.C. § 1983 or any other federal law until he has exhausted available administrative remedies. 42 U.S.C. § 1997e(a). This requirement is mandatory. *Booth v. Churner*, 532 U.S. 731, 741 (2001). A prisoner seeking leave to proceed *in forma pauperis* in an action challenging the conditions of his confinement brings an action for purposes of 42 U.S.C. § 1997e when he submits his complaint to the court. *Vaden v. Summerhill*, 449 F.2d 1048, 1050 (9th Cir. 2006). Therefore, a prisoner must exhaust available administrative remedies before filing any papers in federal court and the prisoner is not entitled to a stay of judicial proceedings in order to exhaust. *Id.* at 1051; *McKinney v. Carey*, 311 F.3d 1198 (9th Cir. 2002). As noted above, the law now is clear that section 1997e(a) requires “proper” exhaustion, including compliance with any requirement that a grievance be filed within a particular time-frame. *Woodford v. Ngo*, \_\_\_ U.S. \_\_\_, 126 S.Ct. 2378, 2384-2385, 2387-2388 (2006). Failure to exhaust is an affirmative defense, which defendant has the burden of proving. *Jones v. Bock*, \_\_\_ U.S. \_\_\_, 127 S.Ct. 910, 921 (2007).

California prisoners may, appeal “any departmental decision, action, condition, or policy which they can demonstrate as having an adverse effect upon their welfare.” Cal. Code Regs. tit. 15, § 3084.1(a). An appeal must be submitted “within 15 working days of the event or decision being appealed, or of receiving an unacceptable lower level appeal decision.” *Id.*, at § 3084.6(c). An untimely appeal may be rejected. *Id.*, at § 3084.3(c)(6). The regulations require the use of specific forms, but contain no guidelines for grievance content. *Id.*, at §§ 3084.2, 3085. Prisoners ordinarily must present their allegations on one informal and three formal levels of review, although the informal and the first formal levels may be bypassed. *Id.*, at § 3084.5. A

1 division head reviews appeals on the first formal level, *see id.*, at § 3084.5(b)(3) (authorizing  
 2 bypass of the first formal level when the division head cannot resolve it), and the warden or a  
 3 designee thereof reviews appeals on the second formal level. *See Id.*, at § 3084.5(e)(1).  
 4 Generally, completion of the third level, the Director's Level of Review, exhausts the remedy.  
 5 *Id.*, at § 3084.1(a). If at any time a prisoner abuses the appeals process, as by submitting "[a]n  
 6 appeal containing false information, or profanity or obscene language," the appeal must be  
 7 rejected. *Id.*, at §§ 3084.3(c)(8), 3084.2(f).

8 Defendants Murray, Ramirez-Palmer, Andreasen and Donahue assert that plaintiff did  
 9 not pursue to the Director's Level of Review his concerns about his medical care. Defs.' Mot.  
 10 for Summ. J., at 26. As noted above, plaintiff alleges that Ramirez-Palmer, Andreasen and  
 11 Donahue learned of plaintiff's inadequate medical care through the appeals system, but failed to  
 12 take reasonable measures to ensure that plaintiff received proper care. Plaintiff alleges that  
 13 defendant Murray entered his cell, threatened plaintiff and destroyed his personal property.  
 14 Plaintiff filed separate administrative appeals about these allegations. Therefore, the court  
 15 addresses the appeals separately.

#### 16 **1. Defendants Ramirez-Palmer, Andreasen and Donahue**

17 With respect to these defendants, it is important to recall that the exhaustion requirement  
 18 is designed to "filter out the bad claims and facilitate consideration of the good," by "allow[ing]  
 19 [jail] officials an opportunity to resolve disputes concerning the exercise of their responsibilities  
 20 before being haled into court." *Jones v. Bock*, 127 S. Ct., at 914. The entire CDCR appeals  
 21 process is designed so that at each successive level, not only the "problem" described by the  
 22 prisoner is reviewed, but also how the lower-level reviewer handled the problem inherently is  
 23 reviewed. Thus, for example, Donahue interviewed plaintiff on the first formal level of review,  
 24 and Andreasen reviewed it and denied relief. An appeal to the second formal level of review  
 25 would constitute an appeal not only about the problem outlined in the grievance, but also of how  
 26 Donahue and Andreasen handled it. The same reasoning applies to an appeal to the Director's

1 Level of Review. Deciding not to modify the lower-level reviewer's decision constitutes a  
2 review of that person's actions, and resolves plaintiff's initial problem and any problem he has  
3 with the reviewer's handling of the initial problem. Therefore, the court concludes that the  
4 CDCR's prisoner grievance system does not require a prisoner to file a grievance complaining  
5 about every administrative appeal reviewer's handling of a grievance. Thus, insofar as Donahue  
6 and Andreasen made decisions about plaintiff's appeals, plaintiff exhausted if he pursued the  
7 grievance to the Director's Level of Review. The crux of the matter, then, is whether plaintiff in  
8 fact pursued his grievance to that level. As noted above, it is undisputed that plaintiff did not  
9 appeal to the Director's Level of Review. Thus, plaintiff has failed to exhaust his administrative  
10 remedies and defendants Ramirez-Palmer, Donahue and Andreasen are entitled to judgment as a  
11 matter of law.

## 12 **2. Defendant Murray**

13 Similarly, there is no genuine dispute that plaintiff failed to exhaust his administrative  
14 remedies as to his claim against defendant Murray. Defendant Murray has submitted evidence  
15 that plaintiff did not file any grievance about his conduct after he was denied relief on the first  
16 formal level of review. Plaintiff does not remember whether he pursued this grievance beyond  
17 this level. Moreover, he concedes that no prison official prevented him from filing appeals.  
18 Thus, there is no dispute about whether he appealed Murray's conduct to the Director's Level of  
19 Review. A reasonable fact finder could find in plaintiff's favor on this issue. Accordingly, the  
20 motion must be granted with respect to defendant Murray.

## 21 **B. Medical Claims**

22 Plaintiff claims that defendants Mehta, Dhillon, Altchek and Pai were deliberately  
23 indifferent to his serious medical needs. These defendants seek summary judgment on these  
24 claims.

25 Prison officials violate the Eighth Amendment when they are deliberately indifferent to  
26 prisoner's serious medical needs. *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). A prison official

1 is deliberately indifferent when he knows of and disregards a risk of injury or harm that “is not  
 2 one that today’s society chooses to tolerate.” *Farmer v. Brennan*, 511 U.S. 825, 837 (1994).  
 3 Deliberate indifference may be shown by the denial, delay or intentional interference with  
 4 medical treatment or by the way in which medical care is provided. *Hutchinson v. United States*,  
 5 838 F.2d 390, 394 (9th Cir. 1988). Prison personnel risk Eighth Amendment liability if they  
 6 knowingly prescribe specifically contraindicated medications, fail to treat a known, serious  
 7 medical condition or ignore a physician’s prescribed treatment. *Ortiz v. City of Imperial*, 884  
 8 F.2d 1312, 1314 (9th Cir. 1989); *Hunt v. Dental Dep’t*, 865 F.2d 198, 201 (9th Cir. 1989);  
 9 *Wakefield v. Thompson*, 177 F.3d 1160 (9th Cir. 2003).

10 However, of particular significance here, negligence in diagnosing or treating a medical  
 11 condition, does not violate a prisoner’s Eighth Amendment rights. *Hutchinson*, 838 F.2d at 394.

12 The court will examine plaintiff’s claims in turn.

### 13 **1. Dr. Mehta**

14 Plaintiff claims that defendant Dr. Mehta was deliberately indifferent to his complaints of  
 15 pain by referring plaintiff to a psychiatrist. Dr. Mehta contends that plaintiff cannot adduce  
 16 evidence to establish a genuine dispute about whether he was deliberately indifferent to  
 17 plaintiff’s serious medical needs. The parties do not dispute that plaintiff had a serious medical  
 18 condition, i.e., ongoing severe pain which, once diagnosed turned out to be tuberculosis that had  
 19 infected his bones. See *McGuckin v. Smith*, 974 F.2d 1050, 1060 (9th Cir. 1992), *rev’d sub nom.*  
 20 *on other grounds, WMX Tech., Inc. v. Miller*, 104 F.2d 1133 (9th Cir. 1997) (condition is  
 21 serious if the failure to treat it could result in further significant injury or in unnecessary and  
 22 wanton infliction of pain). The only question, therefore, is whether Mehta’s response to  
 23 plaintiff’s complaints and symptoms constituted deliberate indifference.

24 It is undisputed that Mehta examined plaintiff several times. On November 16, 2000,  
 25 plaintiff went to the medical clinic with lower chest pain, which worsened when he was lying  
 26 down on either side. Defendant Mehta examined him and questioned him about other possible

1 symptoms. He found that plaintiff's left lower ribs were tender and noted that recent x-rays  
2 showed no abnormalities. He therefore prescribed medications to treat plaintiff's symptoms and  
3 authorized plaintiff to remain in bed for 48 hours, and he ordered diagnostic testing. Mehta next  
4 saw plaintiff on January 23, 2001. He reported back pain, indicating his spine, and severe left  
5 lower chest pain which radiated to the epigastrium. Again, Mehta examined plaintiff and  
6 questioned him about other possible symptoms. He noted that a recent CT scan was negative for  
7 abnormalities, and decided to rule out certain gastro-intestinal disorders. Therefore, he ordered  
8 additional diagnostic tests. He also referred plaintiff to psychiatry to rule out certain  
9 psychological disorders that could cause plaintiff to experience the physical symptoms he  
10 reported. This course hardly supports a claim of indifference. To the contrary, it strongly  
11 suggests that although defendant Mehta was having a difficult time diagnosing the etiology of  
12 plaintiff's problems, he clearly was not indifferent to them.

13 Plaintiff asserts that the referral to a psychiatrist shows that Mehta knew of plaintiff's  
14 serious medical needs, yet refused to attend to them. On the present record, the court cannot  
15 conclude that Mehta's concern that plaintiff symptoms might be due to a somatization disorder  
16 was, in effect, deliberate indifference to a known health risk. Quite the contrary, Mehta was  
17 trying to identify the origin of plaintiff's symptoms. He ordered countless tests in an attempt to  
18 diagnose a physical disorder. Ruling out somatization hardly constitutes indifference. As it  
19 turns out, the disease from which plaintiff was suffering is rare. Thus, it is not surprising that  
20 Mehta had a difficult time diagnosing the plaintiff's medical problem. Tuberculosis is highly  
21 contagious and not uncommon in prison populations. *See Lee v. Armontrout*, 991 F.2d 487, 489  
22 (8th Cir. 1993) (recognizing the danger of tuberculosis spreading in prisons). Furthermore, there  
23 is no evidence that Mehta's referral was based on anything other than an inability to isolate a  
24 physical diagnosis to explain plaintiff's symptoms. On the record presently before the court, no  
25 reasonable jury could find that defendant Mehta was deliberately indifferent to plaintiff's  
26 medical condition.

1                   **2. Defendant Altchek**

2           Plaintiff claims that this defendant refused to take reasonable measures to diagnose his  
3 ailment. Dr. Altchek contends that there is no genuine issue about whether he was deliberately  
4 indifferent. Plaintiff argues that Altchek's conduct on March 20, 2001, creates such an issue.  
5 Plaintiff asserts that on this date, Altchek became enraged with plaintiff and expelled him from  
6 the medical clinic without prescribing medication for his pain. It is undisputed that plaintiff saw  
7 defendant Altchek in the medical clinic on March 20, 2001. The evidence of exactly what  
8 occurred on March 20, 2001, is sparse. However, the record shows that plaintiff again reported  
9 severe back pain, for which Altchek granted plaintiff another week of rest in his cell and  
10 recommended a follow-up appointment in three days. Plaintiff, who was having persistent pain  
11 was apparently frustrated with the inability of the doctors to determine its source and treat it.  
12 Altchek does not deny losing his temper with plaintiff. In fact, he noted on plaintiff's medical  
13 chart that he "threw [plaintiff] out when he stated where did I get my medical degree, etc." The  
14 mutually expressed frustration with each other does not violate the Eighth Amendment.

15           It also is undisputed that Altcheck had examined plaintiff on previous occasions,  
16 including on December 12, 2000, when he examined plaintiff for lower left chest pain and on  
17 February 7, 2001, when plaintiff arrived in the clinic on an emergency basis. Altcheck was  
18 familiar with plaintiff's symptoms, and with the diagnostic measures and medications that had  
19 been ordered. Defendant Altchek also examined plaintiff on February 13, 2001, when plaintiff  
20 complained of "paralyzing pain," which had spread to his middle to lower back. Altchek ordered  
21 x-rays, and plaintiff was diagnosed as having suffered a lower spine fracture. He prescribed  
22 oxycodone for pain, authorized plaintiff to remain in his cell for one week. Furthermore, despite  
23 the March 20, 2001, incident, Altchek saw plaintiff again on March 27, 2001, and ordered blood  
24 tests, another one week of bed rest and an MRI of the lumbar-sacral area of his spine. It can  
25 hardly be said that these efforts by Altchek constitute deliberate indifference to plaintiff's  
26 medical issues.



1 Plaintiff asserts that Altcheck did not prescribe him any pain medications on March 20,  
2 2001. However, Altchek already had prescribed oxycodone for pain. There is no evidence that  
3 plaintiff needed an order to continue the medications that he already was taking or that Altchek  
4 knew plaintiff needed new, different medications. In fact, the record is replete with evidence  
5 that various physicians regularly renewed plaintiff's prescriptions or ordered new medications as  
6 necessary. Plaintiff had a rare disease. These treating doctors had a difficult time diagnosing it.  
7 But they clearly were attentive to the symptoms and were trying to identify the etiology of his  
8 problems. On this evidence, no reasonable jury could find in plaintiff's favor. Defendant  
9 Altchek is entitled to judgment as a matter of law.

### 10 **3. Defendant Dhillon**

11 Plaintiff claims that defendant Dhillon was deliberately indifferent by ordering diagnostic  
12 tests that were unrelated to plaintiff's pain. Dhillon contends that plaintiff cannot adduce  
13 evidence to show a genuine dispute about whether he was deliberately indifferent. Plaintiff  
14 argues that he has submitted sufficient evidence on this point, asserting that Dhillon denied  
15 plaintiff an MRI and prescribed only Tylenol for pain solely because Altchek had convinced him  
16 that plaintiff was malingering. It is undisputed that defendant Dhillon repeatedly examined and  
17 treated plaintiff for his reports of pain. As of February 14, 2001, based on a series of diagnostic  
18 tests, Dhillon believed that plaintiff suffered from duodenitis and a bacterial infection. Dhillon  
19 prescribed medication, ordered additional diagnostic testing to rule out other diseases, and noted  
20 that plaintiff had a T-8 fracture, the cause of which no one could identify. Dhillon saw plaintiff  
21 again at the end of February and in the beginning of March. In early March, he renewed  
22 plaintiff's medications and referred him to the gastro-intestinal clinic. He saw plaintiff again on  
23 March 15, 2001, and recommended that plaintiff continue taking his medications as well as  
24 referring plaintiff again to the gastro-intestinal clinic, the neurology clinic and the orthopedic  
25 clinic. He also authorized plaintiff to remain in his cell to rest and advised plaintiff not to lift  
26 over 10 pounds or to stand for more than 20 minutes.

1        Thus, Dhillon knew of plaintiff's symptoms. But it cannot be fairly concluded from any  
2 of the evidence that he was deliberately indifferent to them. He ordered medications and  
3 diagnostic testing, and he recommended that plaintiff be examined by various specialists.  
4 However, Dr. Altchek already had ordered an MRI, which plaintiff ultimately underwent.  
5 Plaintiff has not produced any evidence that Dhillon should have ordered an MRI before the  
6 other physicians or that he in any way delayed plaintiff's undergoing an MRI so as to cause  
7 plaintiff further injury. On the evidence currently before the court, no reasonable jury could find  
8 for plaintiff on his claim that Dhillon was deliberately indifferent. Defendant Dhillon is entitled  
9 to summary judgment.

#### 10                    **4. Pai**

11        As noted above, plaintiff claims that defendant Pai was deliberately indifferent to injuries  
12 he sustained after falling in the shower. Defendant Pai contends that plaintiff cannot present  
13 evidence showing that she was deliberately indifferent. Plaintiff claims that Pai refused to treat  
14 his injuries, which included the worsening of his condition following surgery. It is undisputed  
15 that on February 20, 2004, plaintiff fell in the shower. He went to the medical clinic for  
16 emergency treatment, which Pai administered.

17        The record shows that plaintiff reported some discomfort in his lower back and in one  
18 ankle, and that he was able to move his lower extremities without difficulty. He was alert,  
19 awake and responsive, and could bend down to unlace his shoes without apparent discomfort.  
20 Pai prescribed an anti-inflammatory medication, an ice pack and an Ace bandage for the  
21 discomfort and slight swelling in plaintiff's ankle. She also authorized cell-feeding for plaintiff  
22 for one week. In her opinion, plaintiff suffered a sprain in his left ankle and a musculoskeletal  
23 injury in his back, which caused minimal discomfort. She recommended that plaintiff return in  
24 three days for a follow-up examination.

25        Plaintiff asserts that he injured his head and ankle, and worsened the condition in his  
26 back where he had undergone surgery in 2001. Plaintiff offers no evidence of a head injury that

Pai failed to diagnose and treat, let alone that she deliberately ignored. Pai's examination included probing for head injuries, as evidenced by her observation that he was alert and awake. Nor does plaintiff adduce any evidence that she ignored any symptoms in his lower back or failed to treat the symptoms she actually observed in that area. While plaintiff may disagree with her diagnoses and treatment, this is insufficient to survive summary judgment. *See Jackson v. McIntosh*, 90 F.3d 330, 332 (9th Cir.1996) (difference of opinion between inmate and physician regarding treatment does not amount to deliberate indifference). There is no evidence that the treatment Pai provided was medically unacceptable under the circumstances. *See Id.*, 90 F.3d at 331-32. On this evidence, no reasonable jury could find in plaintiff's favor. Accordingly, defendant Pai is entitled to judgment as a matter of law.

### **C. Plaintiff's State Law Claims**

Plaintiff makes several claims that defendants were negligent in violation of California law. Defendants contend that these claims must be dismissed because plaintiff failed timely to present his claims as required by the California Tort Claims Act. *See Cal. Gov't Code §§ 900, et seq.*

As a threshold matter, the court address the question of is pendent of supplement jurisdiction over these state law claims. Supplement jurisdiction over state law claims exists if the federal claim is sufficiently substantial to confer federal jurisdiction, and there is a common nucleus of operative fact between the state and federal claims. *Gilder v. PGA Tour, Inc.*, 936 F.2d 417, 421 (9th Cir.1991). Where the court dismisses or disposes of the federal claims it has the discretion to retain or decline supplemental jurisdiction over the state claims. *See Imagineering, Inc. v. Kiewit Pac. Co.*, 976 F.2d 1303, 1309 (9th Cir.1992) (affirming the district court's retention of state law claims after RICO claim was dismissed), *cert. denied*, 507 U.S. 1004 (1993). The decision to retain jurisdiction over state law claims is within the district court's discretion, weighing factors such as economy, convenience, fairness, and comity. *Id.*

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1 Here, defendants point out that even if this court is inclined to retain jurisdiction over  
2 plaintiff's state-law claims, it cannot. Plaintiff failed to comply with mandatory procedures that  
3 are jurisdictional prerequisites under California law. In light of California's greater interest than  
4 the federal court in sorting out whether plaintiff had a justifiable reason for filing his  
5 administrative claim late, and in light of the number of cases filed in this court which involve  
6 questions of whether prisoners' federal constitutional rights have been violated, supplemental  
7 jurisdiction over these state law claims should be declined.

8 **IV. Conclusion**

9 For the reasons explained above, the court finds that there is no genuine issue about  
10 whether plaintiff exhausted the available administrative remedies for his claims against  
11 Andreasen, Donahue, Murray or Ramirez-Palmer and they are entitled to judgment as a matter of  
12 law. Furthermore, plaintiff has failed to demonstrate any triable issue of fact with respect to his  
13 claims against Mehta, Altchek, Dhillon or Pai. Further, the court should decline supplemental  
14 jurisdiction over plaintiff's state-law claims.

15 Accordingly, it is hereby RECOMMENDED that defendants' April 20, 2007, motion for  
16 summary judgment be granted, judgment be entered in favor of all defendants and that the Clerk  
17 of the Court be directed to close this case.

18 These findings and recommendations are submitted to the United States District Judge  
19 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days  
20 after being served with these findings and recommendations, any party may file written  
21 objections with the court and serve a copy on all parties. Such a document should be captioned  
22 "Objections to Magistrate Judge's Findings and Recommendations." Failure to file objections

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1 within the specified time may waive the right to appeal the District Court's order. *Turner v.*  
2 *Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

3 Dated: March 4, 2008.

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5 EDMUND F. BRENNAN  
6 UNITED STATES MAGISTRATE JUDGE  
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